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No. 592

Supreme Court of the United States

October Term, 1963

COCHEYSE J. GRIFFIN, ETC., ET AL.,
Petitioners,

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

MEMORANDUM ON BEHALF OF RESPONDENTS IN REPLY TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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PRELIMINARY STATEMENT

During oral argument of this case on March 30, 1964, the Solicitor General of the United States requested permission of the Chief Justice to file a supplemental memorandum of authorities on behalf of the United States as *amicus curiae*. Permission was granted by the Chief Justice, and leave to reply to the proposed memorandum was simultaneously accorded respondents. Pursuant to the leave thus conferred, the instant memorandum of respondents in reply to the supplemental memorandum of the United States is filed.

ARGUMENT

I.

In his supplemental memorandum the Solicitor General advances two separate considerations which are alleged to support the conclusion that a District Court of three judges was not required in the case at bar.

Initially, the Solicitor General suggests that the "thrust of the present action" is not to restrain the enforcement, operation or execution of a State statute, but merely to restrain a "course of executive or administrative action" entered upon by the respondents without sanction of State law. See, Supplemental Memorandum for the United States, p. 2.

As illustrative of the stated suggestion, the Solicitor General makes reference to the decisions of this Court in *Ex Parte Bransford*, 310 U. S. 354, and *Phillips* v. *United States*, 312 U. S. 246. The former case involved collateral proceedings in a suit by a bank to enjoin the collection of certain taxes by local officials upon the ground, *inter alia*, that the assessments underlying the challenged taxes were *unauthorized* by Arizona law. This Court held that a three-judge District Court was not required to consider such a complaint because the "validity of the statute itself is not involved" and the challenged assessments, if erroneous, were "so because of a wrong done by officers under the statute rather than because of the requirement of the statute itself." *Id.* at 359. Similarly, in the latter case, suit was instituted by the United States to restrain the Governor of Oklahoma from a course of conduct alleged to be *unauthorized* by law. There, the Court also held that a three-judge District Court was not required because the suit involved only an attack upon a "lawless exercise of authority" and not "an attack upon the constitutionality of the statute" conferring the authority. *Id.* at 252. In support of its position, the Court

pointed out that the complaint of the United States "assailed merely the Governor's action as exceeding the bounds of law." *Id.* at 252.

It is difficult for respondents to conceive how it may even be intimated that these decisions have any relevance whatever to the situation presented in the case at bar. *Bransford* and *Phillips* could be relevant to the instant case *only if* a claim could be made that the challenged conduct of the present respondents was *unauthorized* by Virginia law. Of course, no such claim can possibly be made in the instant case, for the decision of the Supreme Court of Appeals of Virginia in *School Board* v. *Griffin*, 204 Va. 650, 133 S.E. (2d) 565, conclusively establishes that every aspect of the activity of the respondents is fully authorized by Virginia law and has been taken in complete conformity with the constitutional and statutory provisions of Virginia law authorizing such conduct.

However, *Bransford* and *Phillips* do contain language which is applicable to the instant situation. Thus, in *Bransford, supra*, at 361, the Court pointed out:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. *In such a case the attack is aimed at an allegedly erroneous administrative action.* . . . Where by an omission to attack the constitutionality of a state statute, *its validity is admitted for the purposes of the bill*, a determination by the trial court that *the assessment accords with the statute would result in the refusal of the injunction and the dismissal of the bill.*" (Italics supplied)

Applying the above-quoted observation to the case at bar, it necessarily follows that if the amended supplemental complaint fails to attack the constitutionality of the relevant provisions of Virginia law, a determination by the trial court that the conduct of respondents "accords with" Virginia law would necessarily entail a refusal of the requested injunction and the dismissal of the amended supplemental complaint. Of course, a determination by the trial court that the conduct of the respondents *does* accord with Virginia law is the only determination which the trial court could make, for this question of State law has been laid to rest in conclusive fashion by *School Board* v. *Griffin, supra*, a decision which is absolutely binding on the District Court.

Moreover, in *Phillips, supra*, at 251, this Court declared that activation of the three-judge District Court statute:

> "... requires a suit which seeks to *interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute* or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident *state-wide doom by a federal court of a state's legislative policy.*" (Italics supplied)

This, of course, is precisely what the Solicitor General asserts is the "primary challenge" in the case at bar. See, Supplemental Memorandum for the United States, p. 3. Petitioners seek to interpose the Fourteenth Amendment to the Constitution of the United States against the enforcement, operation and execution of the long standing State policy of Virginia with respect to the "local option" operation of public schools, which policy has for generations been expressed in the constitutional and implementing statutory provisions of Virginia law. The amended supplemental com-

plaint clearly and aggressively calls for the "state-wide doom by a federal court" of Virginia's legislative policy permitting such local option in the operation of public schools. Manifestly—under the very decisions cited by the Solicitor General—the granting of such relief requires convocation of a three-judge District Court.

So far as the Virginia tuition grant statute is concerned, the Solicitor General acknowledges that the relief requested by the amended supplemental complaint in this respect involves a "challenge to the constitutionality of the State law providing for the payment" of such grants, and the Solicitor General admits that *only* "a three-judge court could grant or deny" the State-wide relief requested in the amended supplemental complaint. See, Supplemental Memorandum for the United States, p. 3. This, of course, is precisely the position which respondents have taken since the amended supplemental complaint was filed, which position was quite naturally taken on the basis of, and in response to, the claims set up and the relief requested in the amended supplemental complaint.

It is now asserted that petitioners have "abandoned any broad attack on the Virginia tuition grant statute" and have confined themselves—as has the United States—to seeking relief on narrower grounds not requiring convocation of a three-judge District Court. Respondents, of course, have not been advised of the nature of the narrower claim or of the legal basis upon which such claim is predicted. Certainly, the reduced claim cannot be positioned upon the basis assigned by the District Court—*i.e.*, that the Virginia tuition grant statute does not authorize the payment of grants to persons residing in localities where no public schools are operated— for this obvious misconstruction of State law by the District Court has been conclusively removed from the

realm of possible utilization by the decision of the Virginia Supreme Court in *School Board* v. *Griffin, supra*. If some other legal basis for the narrower claim exists, it has not been asserted by petitioners or the United States in any prior stage of these proceedings, and certainly "due process of law" would require that respondents be informed of this legal contention and afforded an opportunity to consider and defend against it.

Secondly, the Solicitor General suggests that a District Court of three judges is not required in the case at bar because "the present suit is directly primarily against local officials and involves a matter of only local immediate concern." See, Supplemental Memorandum for the United States, 4. Surely, this is an astounding assertion for anyone even remotely connected with this litigation to make. In view of the record in this case, the assertion is utterly inconceivable. The *State* Board of Education of the *Commonwealth of Virginia* and the Superintendent of Public Instruction of the *Commonwealth of Virginia* were expressly made parties defendant to this suit by the amended supplemental complaint, such State officers are sought to be covered by every injunction now requested in the prayers for relief which are still active in this case and such State officials are even now—and for the past two years have been—restrained by the injunction entered by the District Court prohibiting the payment of tuition grants to residents of Prince Edward County.

Only a casual reading of the cases cited by the Solicitor General in this portion of his supplemental memorandum is required to demonstrate their irrelevance to the situation presented in the case at bar. The inapplicability of *Ex Parte Collins*, 277 U. S. 565, is most easily exposed by reference to the factual complex described by the Court in the following language (277 U. S. at 567-569):

"The defendants in the suit are the *city of Phoenix*, Arizona, and Schmidt-Hitchcock, contractors, *a private Arizona corporation*. The purpose of the suit is to enjoin *the city, its officers, and the contractor*, from proceeding under a *resolution adopted by the city* directing the paving of a street on which the petitioner is an abutting owner.

* * *

"Schmidt-Hitchcock objected to the calling of additional judges on the ground that the case did not fall within the purview of § 266, but was merely one in which it was sought to prevent *a municipal corporation and its officers from proceeding with a municipal improvement*.

"The suit is not one to restrain 'the enforcement, operation, or execution' of a statute of a state within the meaning of § 266.

* * *

"Thus, the section has long been held inapplicable to suits seeking to enjoin the execution of *municipal ordinances, or the orders of a city board*.

* * *

"Moreover, the enabling act is not itself being enforced within the meaning of § 266. That act merely authorizes further legislative action to be taken by the city, as by the resolution here in question. *It is that municipal action, not the statute of a state*, whose 'enforcement, operation, or execution' the petitioner seeks to enjoin." (Italics supplied)

Moreover, in *Rorick* v. *Everglades Drainage Dist.*, 307 U. S. 208, the statutes there under attack constituted local or special legislation applicable only to the Everglades Drainage District. Such statutes were not of "general application" throughout the State of Florida, but affected "exclusively a particular district of Florida." *Id.* at 212. Finally, in *Wilentz* v. *Sovereign Camp. W.O.W.*, 306 U. S. 573, the State of-

ficials there involved were designated by this Court as "nominal parties" whose "presence is not required to prevent the operation" of the statute there challenged. Indeed, this Court pointed out that the trial court's decree "enjoined no action" by State officials. *Id.* at 579.

Surely, no one can seriously suggest that the Virginia tuition grant statute is not a statute of general application, or that it is one which is applicable to and affects only a particular locality or district of Virginia. On the contrary, it is perfectly clear that such statute applies to every political subdivision (and every child of school age residing therein) from the Eastern Shore to the Kentucky border, from the District of Columbia to the North Carolina line. Moreover, no one can seriously suggest that the State Board of Education or Superintendent of Public Instruction are merely "nominal parties" whose presence is not required to grant the requested relief. As previously pointed out and as the injunction of the District Court confirms, these State officials are indispensably necessary parties whose activities must be enjoined if the enforcement, operation or execution of the statute in question is to be restrained.

In light of the foregoing, counsel for the respondents submit that neither of the considerations suggested by the Solicitor General supports the conclusion that a three-judge District Court was not required in the case at bar. On the contrary, the necessity for convocation of such a tribunal is as fully apparent now as it has been at all times during the course of this litigation.

NOTE: Since completion of our memorandum argument in response to the supplemental memorandum of the Solicitor General with respect to the necessity of convening a three-judge District Court in the case at bar, respondents have received the Supplemental Memorandum for Petitioners dis-

cussing this aspect of the instant litigation. Essentially, it is the position of the petitioners that they do not challenge the constitutionality of the Virginia tuition grant statute *on its face*, but only as the statute is *applied* in the instant case. In this connection, on page 2 of their supplemental memorandum, petitioners assert that:

> ". . . since this attack does not bring into question the constitutionality of the statute *on its face but only in respect to its application*, the convening of a three judge statutory district court is not a jurisdictional prerequisite." (Italics supplied)

In response to this assertion, respondents submit that petitioners' reliance upon the purported distinction is entirely misplaced. An injunctive suit attacking the constitutional validity of a statute *as applied* is one which requires a three-judge court equally as much as one which attacks the constitutional validity of a statute on its face. This very point was expressly made in the principal decision relied upon by petitioners, *Ex Parte Bransford, supra*, at 361, in which this Court pointed out:

> "If is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute *as applied, which requires a three-judge court*, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." (Italics supplied)

To precisely the same effect is the language of this Court in the recent case of *Idlewild Liquor Corp.* v. *Epstein*, 370 U. S. 713, 714, in which this Court held that a three-judge court should have been convened to hear a complaint which:

> ". . . asked for a judgment declaring that the state statutes, ***as applied***, were repugnant to the Commerce Clause, the Export-Import Clause, and the Supremacy Clause of the United States Constitution, and for an injunction restraining the State Liquor Authority from interfering with the ***petitioner's business.***" (Italics supplied)

Similarly, in the leading case of *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 12, this Court also held that a three-judge District Court was required to hear a suit brought by the railroad company:

> ". . . to restrain the enforcement of a statute of the State of Illinois (General Corporation Act, § 107), providing for the payment of a minimum franchise tax, upon the ground that the statute ***as applied to the complainant*** violated the commerce clause, and the due process and equal protection clauses, of the Federal Constitution." (Italics supplied)

See also, *Query* v. *United States*, 316 U. S. 468; *Kesler* v. *Department of Public Safety*, 369 U. S. 153. In light of the consistent language of this Court in the above-quoted decisions, it is unarguably apparent that a three-judge District Court is required to hear an injunctive complaint involving the constitutionality of a statute ***as applied***, as well as one involving the constitutionality of a statute on its face.

II.

In that portion of his supplemental memorandum designated "Other authorities," the Solicitor General submits that "in the eyes of the Constitution, the conduct of the several respondents, however independently each of them may have acted, is viewed as a whole and is attributed to the State of

Virginia." The apparent purpose of this assertion is to establish the proposition that all public officials of Virginia are amenable to the Fourteenth Amendment under the "State action" concept, including local officials of Prince Edward County. Of course, respondents have never asserted, or attempted to assert, that local public officials are immune to the prohibitions of the Fourteenth Amendment or that their action, if unconstitutional, may not be properly restrained. In this connection, neither *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, nor *Labette County Commissioners* v. *United States ex rel Moulton*, 112 U. S. 217, cited by the Solicitor General, involved a suit to challenge the constitutional validity of a local option law or to compel affirmative action on the part of State officials or to enjoin action by State officials in the enforcement, operation or execution of a State law.

The source of the Solicitor General's dilemma in the present case is not difficult to ascertain. For purposes of the Fourteenth Amendment, the Solicitor General attempts to attribute the independent actions of all of the respondents (State and local) to the State of Virginia; however, when faced with the jurisdictional barrier of the Eleventh Amendment or the fatal bar of the three-judge court requirement, he conveniently forgets that the instant suit seeks to require affirmative action on the part of State officials and to enjoin State officials from the enforcement of the Virginia tuition grant statute, and he then asserts that "the present suit is directed primarily" against local officials.

Counsel for the respondents respectfully submit that the Solicitor General cannot have it both ways. If the State Board of Education of the Commonwealth of Virginia and the Superintendent of Public Instruction of the Commonwealth of Virginia are—in fact and in law—State officials

(as, of course, they indisputably are), the Solicitor General cannot transform them into "local officials" by the mere manipulation of labels to suit his purpose of the moment.

Nor can the Solicitor General escape the prohibition of the Eleventh Amendment by the untenable suggestion that the relief sought in this case is essentially negative in character. This suggestion is clearly demolished by the Solicitor General's own revealing statement that the primary relief sought in the instant case is that "requiring reopening of the public schools." See, Supplemental Memorandum for the United States, p. 4. By no stretch of the imagination can it be said that a suit which seeks to require officials of the Commonwealth of Virginia to open and operate public schools and to expend for this purpose monies which have not been appropriated by the General Assembly is one which seeks essentially negative relief.

The Department of Justice understood the true nature of this case and of the relief sought herein when it attempted in May, 1961, to gain admission of the United States as a party in this litigation. At that time the Attorney General of the United States declared in his Motion to Intervene as a Plaintiff that intervention by the United States "is necessary," and in support of that assertion said in his Memorandum of Law filed in the District Court:

> "The representation of the interest of the United States by the plaintiffs is plainly inadequate. The United States, by its complaint in intervention, has joined the State of Virginia in order to secure complete relief in this action, in which the United States contends that the State is circumventing this Court's order by action which is unlawful in that it denies to the residents of Prince Edward County the equal protection of the laws. *But the State of Virginia can be made a defendant only by the United States, since the Eleventh Amendment*

> *of the United States Constitution bars the plaintiffs from suing a State without its consent.*" (Italics supplied) (*Allen* v. *County Board, etc.*, 28 F. R. D. 358, 361)

Thus we see that in 1961 the Justice Department understood full well that the relief sought herein is in fact relief against the State and that the relief sought is of such nature as to fall within the scope of the Eleventh Amendment. The validity of the proposition italicized above and set forth by the Department of Justice in 1961 is clearly indicated by the inability of the Solicitor General to cite any decision other than *Ex Parte Young*, 209 U. S. 123, in support of the diametrically opposite position now asserted by the Department of Justice. *Ex Parte Young*, of course, is a classic example of a suit to enjoin a State officer from taking action to enforce a State law (Minnesota rate statute) and sought merely the cessation of activity under such statute. No affirmative action on the part of any State official was requested. Manifestly, the decision in that case, with which each member of this Court is thoroughly familiar, is utterly foreign to the situation or issues presented in the case at bar.

In support of his attack upon the local option character of the Virginia laws relating to the operation of public schools, the Solicitor General suggests that a State may not constitutionally enact a statute which permits certain of its political subdivisions to operate public schools, while denying the same opportunity to other political subdivisions. On the basis of this premise, he then suggests that since the State legislature may not make such a selection itself, it may not refer the decision to each political subdivision to be determined on the basis of local option. This, of course, is a palpable *non-sequitur*. Even assuming the validity of the

Solicitor General's premise that the State legislature may not itself make such a selection (a premise of doubtful validity under *Salsburg* v. *Maryland*, 346 U. S. 545), it does not at all follow that individual political subdivisions themselves may not be permitted to exercise their discretion under an unrestricted local option law. Assuming, *arguendo*, that the United States may not constitutionally make the National Defense Education Act applicable only to some States and not to others, it does not follow that if that Act is applicable to all States, some States may not elect to participate in the benefits of the Act while others decline to do so. Similarly, in the case at bar, even assuming that the General Assembly of Virginia may not constitutionally provide that all other political subdivisions of the Commonwealth with the exception of Prince Edward County, the City of Fairfax and the City of Franklin may operate public schools, it does not follow that the named political subdivisions may not independently decline to operate public schools under a local option law applicable throughout the State. The heart of the matter is that neither the Solicitor General nor the petitioners have cited one decision of this Court in which a local option statute has been invalidated under the Fourteenth Amendment.

The Supplemental Memorandum filed by the Solicitor General ends with the citation of two cases which are said, by him, to rebut "the allegation that every decision compelling local officers to appropriate public money at the suit of private parties in the courts of the United States involved the enforcement of a *contractual* obligation voluntarily assumed by the locality." We repeat our allegation that such was true in every such case cited by the Solicitor General in Note 36, pages 37 and 38, of his brief and further we insist that the two cases now cited, *Hopkins* v. *Clemson Col-*

lege, 221 U. S. 636, and *Commissioners* v. *United States*, 100 F. (2d) 929, 308 U. S. 343, do not remotely contradict our prior assertion.

In the *Clemson College* case the plaintiff sued a State college for damages to his farm resulting from the construction of a dyke by the college. By no amount of warping can it be construed as a decision that this Court can compel a State or its political subdivisions to levy a tax; to the contrary, we find no discussion of such issue in the case, but rather the Court points to sources out of which a judgment against the college could be paid "besides the states annual appropriation."

The *Clemson College* case is far more pertinent here for a statement made by the Court in considering its jurisdiction against a claim of Eleventh Amendment immunity:

> "And looking through form to substance, the 11th Amendment has been held to apply, not only where the State is actually named as a party defendant on the record, but where the proceeding though nominally against the officer, is really against the State, or is one to which it is an indispensable party. *No suit, therefore, can be maintained against a public officer*, which seeks to compel him to exercise the State's power of taxation or to pay out its money in his possession on the State's obligations, or to execute a contract, or to do any affirmative act which affects the State's political or property rights." (221 U. S. 642) (Emphasis added)

Commissioners v. *United States*, 100 F. (2d) 929, which was modified and affirmed in 308 U. S. 343, was a suit by the United States on behalf of an Indian ward to recover under a State statute taxes assessed and collected against the ward in violation of a treaty exempting his property from State taxes. The lower federal Court held the State's statute

of limitations inapplicable to the United States and awarded judgment for both the taxes and interest. The Supreme Court reversed as to interest which was the only issue appealed. The case has nothing whatsoever to do with requiring a county to levy a tax, nor does it deal with the appropriation of public funds—it merely requires that the County refund money illegally obtained by it. In that case, a sum certain was involved and there had been a legislative determination by the State that taxes illegally collected would be refunded.

Neither case refutes our allegation that the Solicitor General has failed to cite any case in which this Court, or any federal court, has undertaken to burden the citizens of a State or one of its political subdivisions with taxation without representation by exercising in the first instance the purely legislative function of determining that taxes shall be levied for a particular purpose. Such is the action which must be taken here if the Board of Supervisors of Prince Edward County is to be told to levy a tax. The Solicitor General will find no precedent in American jurisprudence because the principle is contrary to a fundamental American concept.

In conclusion, respondents would point out that the case at bar is before this Court on writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit. As stated in the brief filed on behalf of the State Board of Education and Superintendent of Public Instruction, at page 73, respondents submit that the "majority opinion of the Court of Appeals in the case at bar is a fully precedented and thoroughly definitive exposition of the existing law and is absolutely dispositive of the fundamental constitutional issues contrary to the positions of the petitioners."

In this connection, it is not without significance that the Solicitor General and the petitioners have studiously avoided making any reference to any provision of that opinion, or, asserting that any statement therein made is incorrect or is not supported by the numerous decisional authorities cited by the majority jurists. Respondents respectfully submit that if petitioners seek a reversal of the decision of the United States Court of Appeals for the Fourth Circuit upon the ground that such decision incorrectly states the applicable law, then the particulars in which that decision is erroneous should be articulated.

Respectfully submitted,

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PROOF OF SERVICE

I, R. D. McIlwaine, III, one of counsel for the respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of April, 1964, I served copies of the within Memorandum On Behalf Of Respondents In Reply To The Supplemental Memorandum Of The United States As Amicus Curiae on the several petitioners herein by mailing same in duly addressed envelopes, with first-class postage prepaid, to their respective addresses of record as follows: Robert L. Carter, 20 West 40th Street, New York, New York, and S. W. Tucker, 214 East Clay Street, Richmond 19, Virginia.

.....

Assistant Attorney General